United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
Jerome F. O'Neill

Docket No. 75-1341

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA

Appellee

v.

STEVEN JOHN MURRAY

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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STATEMENT OF ISSUES

I WHETHER TROOPER LECLAIR HAD PROBABLE CAUSE TO SEARCH THE GIBEAULT VAN AFTER STOPPING IT ON THE HIGHWAY

II WHETHER THE SEARCH OF THE GIBEAULT VAN WAS BEGUN ON THE HIGHWAY AND CONTINUED AT THE STATE POLICE BARRACKS

III WHETHER MURRAY HAS STANDING TO SUPPRESS THE POSTAL SERVICE EQUIPMENT

UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA

Appellee

v.

STEVEN JOHN MURRAY

Appellant

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Steven J. Murray appeals from a judgment of conviction entered on September 15, 1975 in the United States District Court for the District of Vermont following a plea of guilty before the Honorable Albert W. Coffrin, United States District Judge on July 21, 1975.

An indictment bearing criminal number 75-20, filed February 6, 1975, charged the defendant, Steven John Murray, and a co-defendant, Joseph Arthur Gibeault, in five counts with con-

spiring to steal, purloin and convert United States Postal Service equipment of the value of more than $100.00, and with conspiring to forcibly break into and attempt to break into Post Offices with intent to commit larceny in such Post Offices, in violation of Title 18, United States Code, Section 371 (Count I); forcibly breaking into and attempting to break into Post Offices at Shoreham and Bridport, Vermont, with intent to commit larceny in these Post Offices, in violation of Title 18, United States Code, Sections 2115 and 2 (Counts II and IV); stealing, purloining and knowingly converting to their own use things of value to the United States from the Shoreham and Bridport Post Offices of the United States Postal Service, a department and agency of the United States, of the value of more than $100.00 (Counts III and V).

A suppression hearing was conducted by the Court on June 16, 1975 and the Court denied the motion to suppress on June 20, 1975 with a written opinion which followed on June 25, 1975. Defendant Murray entered a plea of guilty on July 21, 1975 to Count I of the indictment while reserving the right to appeal.*

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*Co-defendant Gibeault entered a plea of guilty on June 25, 1975 to Count II of the indictment, but made no attempt to preserve a right of appeal.

Murray appeared before the Court for sentencing on September 15, 1975, at which time the Court adjudged Murray to be a Youth Offender under 18 U.S.C. Section 5006(e), but one who would not benefit from treatment under the Youth Corrections Act. Murray was committed to the custody of the Attorney General for a period of three years, all of which was suspended with the exception of six months. After the completion of this six month period Murray is to be on probation for a period of three years. The Court ordered that the federal sentence begin to run upon Murray's release from state confinement. The Government dismissed Counts II through V of the indictment following the sentencing.

Murray is presently serving a two to five year sentence after being convicted in the Vermont courts of breaking and entering in the nighttime, which sentence is concurrent with another Vermont state sentence of zero to twenty-four months for giving tools to a prisoner for escape. Murray has not as of this date been in federal custody other than pursuant to a writ of habeas corpus ad prosecundum for purposes of his appearances in this case.

STATEMENT OF FACTS

On January 21, 1975 at approximately 8:30 P.M. Trooper Michael LeClair of the Vermont State Police was standing outside the state police barracks in East Middlebury, Vermont when a van with a faulty muffler went by. (GA* 6; DA**11) The driver revved up the engine as he went by and Trooper LeClair recognized the van as belonging to Arthur Joseph Gibeault. (Id.)

Trooper LeClair pursued the van on Route 7 with the intention of making a stop for defective equipment. (GA 6-7) He followed the van for approximately 1/2 mile and observed the van swerve to the left of the center line, leading him to believe that the driver might be intoxicated. (GA 7; DA 11) Trooper LeClair stopped the van by the side of the highway, walked up to it from the rear and routinely shined his flashlight into the rear of the van, a basic safety precaution and standard Vermont State Police procedure. (GA 7-8; DA 12)

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*GA refers to Government Appendix. Other references are DA - Defendant's Appendix; Tr. - transcript of the June 16, 1975 hearing before the District Court.

**Defendant's Appendix is unnumbered and the numbers used by the Government are those assigned on the basis of a page computation by the Government which counts the first page of the docket sheet as page 1.

The beam of the flashlight revealed the pillowcases containing what appeared to Trooper LeClair to be very expensive looking glassware and one silver-plated item, all of which had been misused by being thrown into the back of the van. (GA 8; DA 12) LeClair observed that the operator of the van was in fact Joseph Gibeault and that the passenger in the right front of the vehicle was Steven Murray. (Id.) Trooper LeClair detected the odor of intoxicants and requested that Gibeault get out of the van and come back to the cruiser, where Trooper LeClair discussed with Gibeault the basic procedure for administering the breath test to determine whether Gibeault was driving while intoxicated. (GA 9; DA 12)

At approximately this same time Trooper LeClair conducted a pat down search of Murray and found a marijuana pipe with residue in it. (GA 13; Tr. 22; DA 12) He arrested Murray for possession of marijuana on the basis of this finding. (Tr. 22-23; DA 12) Trooper LeClair explained to both Gibeault and Murray what their Miranda rights were and both indicated they understood their rights, but only Gibeault was willing to answer questions. (GA 9-10; DA 12)

Following the explanation of his Miranda rights, Gibeault indicated that his father had given him the material LeClair had observed in the van. Gibeault explained that his father had moved out of his house in Cornwall and had given him some junk which Gibeault was to take to the dump in the near future. (GA 10-11; DA 12)

Trooper LeClair is a State Police Officer with seven years experience who spends 70-75% of his time in criminal work. He was aware at the time of the stop of a series of 5-6 burglaries in the Middlebury, Vermont area and suspected Gibeault and Murray of these break-ins. (GA 1-2) LeClair based this suspicion upon information given to him by an informant who indicated that both Murray and Gibeault were in possession of some very expensive glassware items - vases, dishes, etc. (GA 2-3) LeClair had ascertained that at the Chester Way house burglary large quantities of very expensive glassware and dishes had been taken and removed in pillowcases. (GA 3-4) Further, he was aware that expensive jewelry had been taken from another local residence, the Nason residence, and that a pillowcase had been used to remove the property taken. (GA 4) Trooper LeClair also

had learned through investigation that a pea green van, similar to that owned and possessed by Gibeault and being operated by him that night had been observed in the area of the Nason break-in. (GA 4-5) Trooper LeClair knew that both Murray and Gibeault had criminal records and had talked with them about the break-ins. (GA 5-6) Lastly, he did not believe that the material he observed in the van was of the type that most people would be taking to the dump. (GA 11)

LeClair inquired of Gibeault if he could look inside the van and Gibeault indicated that it was alright with him until LeClair opened up one of the doors of the van, at which time Gibeault objected. (GA 12-13) Trooper LeClair continued to open the door of the van and more closely examined the glassware contained in the three pillowcases. (GA 12) He observed that the glassware in fact appeared to be very expensive and did not believe that it would normally be found in the possession of persons such as Gibeault and Murray. (Id.) LeClair indicated to Gibeault that he was

being detained* since he was suspected in some area crimes in which this type of property was stolen. (GA 12) LeClair told Gibeault that if it could be verified where the glassware had come from, that he would be released. (GA 12-13) Trooper LeClair discussed taking the van back to the state police headquarters and Gibeault indicated he was willing to go along with this procedure. (GA 13)

LeClair and other state police officers took Murray, Gibeault and the van back to the nearby state police barracks, where LeClair processed Gibeault for the driving while intoxi-

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*The record reflects the following question and answer:

"Q. Now, did you also explain to Mr. Murray he was being detained?

A. Yes, I did."

GA 12

Although reference inadvertently was made in that question to Murray, it is clear from the context that both the Assistant United States Attorney in asking the question, and Trooper LeClair in answering it, understood the question to refer to Gibeault rather than to Murray. Murray was in fact already under arrest so that this statement would make no sense if applied to him.

cated test and called Gibeault's father about the property found in the van. (Tr. 23; GA 14; DA 13) Gibeault's father indicated that he had not given Gibeault anything other than an old stove or something of this nature when he moved out of the house. (GA 14; DA 13) State police officers conducted an inventory of the van and found various silver-plated items, vases and dishes and a mixture of things which could have come from summer camps,* together with a distinctive silver wedding bell that was found in the glove compartment of the van. (GA 14-15; DA 13) Gibeault was confronted with the wedding bell as an item which had come from the Nason break-in, and after having his Miranda rights again explained, gave a written statement admitting to the breaking and entering into the Nason residence and several others. (Tr. 26; DA 13) Gibeault did not give any statement concerning the Postal Service break-ins at that time but rather two days later, after having confessed to other residential burglaries, gave a written statement to

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*The items in the van, with the exception of the wedding bell, had not in fact come from the Nason and Way burglaries as it appeared to Trooper LeClair, but rather came from summer camps which Murray and Gibeault had burglarized that night. (Tr. 81-82)

another state police officer, admitting the post office burglaries. (Tr. 63; DA 13-14) Gibeault thereafter took the state police officer to the location where some of the postal service equipment was hidden and the equipment was recovered at that time. (DA 14) The remainder was recovered from a second-hand store where Murray and Gibeault had taken it. (Tr. 82)

I. TROOPER LECLAIR HAD PROBABLE CAUSE TO SEARCH THE GIBEAULT VAN AFTER STOPPING IT ON THE HIGHWAY.

Vermont State Police Trooper Michael LeClair, an officer with seven years experience who spent three-fourths of his time doing criminal investigation, was aware at the time that he stopped the Gibeault van that a series of residential burglaries had taken place in the Middlebury, Vermont area, that fine glassware and china were among the items taken, that pillowcases had frequently been used as a means of carrying the stolen property away from the crime scene, that Gibeault's van had been observed in the area of one of the burglaries at about the time of the burglary and that both Gibeault and Murray had known criminal records. Also, LeClair had been told by a confidential informant that Gibeault and Murray were in possession of glassware, which his investigation showed was of the nature of those taken in one of the break-ins. Lastly, he was aware that burglars frequently take the same types of items by the same methods in a series of burglaries.

With these facts in mind, Trooper LeClair previously had questioned both Murray and Gibeault with negative results. On the night of January 21, he followed the van

because of its defective equipment and the appearance that the driver was intoxicated. Upon stopping the van he flashed his light into the van as a basic safety precaution and standard procedure, as noted by the District Court. (DA 12) See United States v. Santana, 485 F.2d 365, 366-70 (2d Cir. 1973). Trooper LeClair believed that the property he observed in the van could have come from either the Nason or Way burglaries. He held this belief even though the burglaries had taken place approximately a month earlier, since in his experience it is common for burglars to wait for a period of time for things to cool down before transporting their stolen merchandise. (Tr. 44) In addition, Gibeault told LeClair that the glassware etc. in the van was destined for the dump, which seemed unlikely to LeClair in view of its apparent high quality. Under these combined circumstances Trooper LeClair clearly had the right to search the van under the automobile exception as carved out by Carroll v. United States, 267 U.S. 132 (1925) and its progeny. See United States v. Jenkins, 496 F.2d 57, 72 - 73 (2d Cir. 1974). Trooper LeClair's routine observation with his flashlight revealed

in plain view apparently stolen property and this, coupled with the other information, gave him probable cause to believe that the property he observed in the van was stolen property,* which justified a search and/or seizure under Carroll. (GA 14 - 15, 43, 51 - 52; DA 20); United States v. Wabnik, 444 F.2d 207 (2d Cir.), cert. denied, 404 U.S. 851 (1971); cf. United States v. D'Avanzo, 443 F.2d 1224 (2d Cir.), cert. denied, 404 U.S. 850 (1971).

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*Defendant goes to great efforts to indicate that the information given by the confidential informant did not meet the reliability requirements of Spinelli v. United States, 393 U.S. 140 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964), and therefor there was no probable cause to search the van. The Government has never contended that the informant was reliable within the meaning of Aguilar and Spinelli. See "Opposition to Motions to Suppress and Memorandum of Points and Authorities," filed by the Government on June, 1975; Tr. 101-02. Defendant also attempts to characterize the informant's information as being a major part of the reason for the stop and search; in fact the Government has contended only that this information was one more factor for Trooper LeClair to consider when deciding whether he had the right to search the van.

It is clear that at the time Trooper LeClair began his search of the van on the highway he had "probable cause to believe that the car contain [ed] articles that the . . . . [he was] entitled to seize." Chambers v. Maroney, 399 U.S. 42, 48 (1970). Once Trooper LeClair had probable cause to conduct a search of the automobile on the highway, there was no requirement that he obtain a search warrant. Id. at 52. The factual situation here bears no resemblance to that found in Coolidge v. New Hampshire, 403 U.S. 443 (1971), since the key factor used by the Supreme Court in Coolidge to distinguish it from Chambers was that the automobile in Coolidge had not been "stopped on the highway" (public property) and in fact was parked in the owner's yard (private property) as usual. Id. at 460-62. The premises in Coolidge were already under guard and there was no likelihood of the defendant or anyone else getting access to the car.* Id. at 461-62. Further, the Court in Coolidge suggested in a

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*Defendant suggests that the car was inaccessible at the state police barracks, but the automobile was not subject to seizure and forfeiture under Vermont law and could have been claimed by its titled owner, Gibeault's father, at any time. Tr. 53; GA 20-21.

footnote that the stopping and searching of automobiles on the highway was not affected by its decision to suppress the evidence taken from the Coolidge vehicle. Id. at 461 n.18.

Even if Trooper LeClair did not have probable cause to search the van on the highway, he could have searched it incidental to the arrest of Murray and Gibeault.* United States v. Roe, 495 F.2d 600, 603 (10th Cir.), cert. denied, 419 U.S. 858 (1974); cf. Preston v. United States, 376 U.S. 364 (1964); United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974), cert. denied, 955 S.Ct.1119 (1975); United States v. Artieri, 491 F.2d 440, 441-43 (2d Cir.), cert. denied, 95 S. Ct. 142 (1974).

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*Murray had been arrested for possession of marijuana and although Gibeault was never formally arrested that night he was not free to go until after he confessed to the burglaries. Tr. 49, 53-54. This confession apparently lead to a decision by the state police to release Gibeault rather than formally arrest him. Such an after the fact determination of course cannot alter the original fact of arrest.

II. THE SEARCH OF THE GIBEAULT VAN WAS BEGUN ON THE HIGHWAY AND CONTINUED AT THE STATE POLICE BARRACKS

Trooper LeClair at one point, after initially stopping the van, opened a door of the van and examined the glassware contained in the pillowcases. This very clearly was a search, as Trooper LeClair himself believed it to be. (Tr. 55-56) He did not continue the search of the van on the highway however since he did not believe he could properly complete the search there and it was unsafe to attempt to conduct a search at that location. (Tr. 61) LeClair could not properly leave the van parked on the highway and return later since under Vermont law it would have been illegal to leave the van parked on the highway (for obvious safety reasons). Defendant attempts to suggest that the examination at the state police barracks was really a second search begun with probable cause obtained from the telephone statement from Gibeault's father that he had only given Gibeault an old stove or something of this nature.*

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*Defendant further suggests that Trooper LeClair only at this point felt he had probable cause to search the vehicle. LeClair's own decision as to whether he had probable cause is not determinative of course. United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974), cert. denied, 95 S. Ct. 1119 (1975). In fact, LeClair felt he had probable cause to search the van on the highway.

LeClair's action in calling Gibeault's father to verify the information is consistent with an experienced officer's attempt to give the defendants the benefit of any doubts before going on with the search. There is no requirement that a search once begun must always be completed, and since probable cause is not defined as an absolute certainty, LeClair wisely exercised his judgment against continuing the search if he could verify Gibeault's story. (Tr. 32-33, 55-56)

Since the continuation of the search at the state police barracks was based upon a legitimate search begun on the highway, the remainder of the search also was proper. Chambers v. Maroney, 399 U.S. 42, 51 (1970); United States v. Carneglia, 468 F.2d 1084, 1089-90 (2d Cir. 1972), cert. denied, sub nom; Inzerillo v. United States, 410 U.S. 945 (1973); Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973).

III. MURRAY DOES NOT HAVE STANDING TO SUPPRESS THE POSTAL SERVICE EQUIPMENT.

Even to the extent that the search here may in any way have been invalid, which the Government strongly contends it was not, Murray does not have standing to seek suppression of the postal service equipment.

The postal service equipment was recovered only after the bell in the glove compartment of the van was used by the state police to obtain a confession from Gibeault to a number of residential burglaries. This initial statement was followed by a second statement and finally Gibeault's confession to the post office burglaries two days later at his home. The equipment was recovered on the basis of this last confession. The first point to be considered with respect to this scenario is that Murray had effectively abandoned the bell. He made no attempt to claim it as his own at the suppression hearing, nor to claim the other property in the van* although his testimony could not have been used directly against him by the Government

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*Murray took the stand initially, but his testimony was withdrawn in its entirety after he declined to answer a number of questions on cross-examination. Tr. 64-71.

under Simmons v. United States, 390 U.S. 377, 394 (1968). Therefor, the lack of a claim of possession in the goods by Murray deprives him of standing since the Supreme Court has suggested that the automatic standing rule of Jones v. United States, 362 U.S. 257 (1960) has been eliminated by Simmons. See Brown v. United States, 411 U.S. 223, 228 (1973). The logic of such a conclusion is clear under the circumstances here where no right of Murray's was infringed upon by the use of the apparently abandoned bell in interviewing Gibeault. The recovery of the postal service equipment was at a point in time and distance even further from the search of the van Murray was riding in. The Government suggests that under these circumstances any possible taint present in earlier searches was sufficiently attenuated as to dissipate the taint and allow the Government to use postal service equipment against Murray. See Wong Sun v. United States, 371 U.S. 471, 491 (1963). The recovery of the postal service equipment most closely parallels the discovery of the witnesses in Michigan v. Tucker, 417 U.S. 433 (1974) and Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), cert denied, 377 U.S. 954 (1964) as the result of constitutional violations. The

violation of Murray's rights, to the extent that there even was one, does not give rise to a right to suppress the evidence sought to be used herein, the postal service equipment. The recovery of these items was too far removed from Murray for him to be entitled to claim that they should be excluded.

CONCLUSION

The decision of the District Court in denying the motion to suppress should be affirmed.

Respectfully submitted,

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Of Counsel

December 19, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	)	
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v.	)	Docket No. 75-1341
	)	
STEVEN JOHN MURRAY	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of Decembe_, 1975 mailed 2 copies of the Government's Brief together with 2 copies of the Appendix to William K. Sessions III, Esq., counsel for the defendant.

Jerome F. O'Neill
Assistant U.S. Attorney